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Supreme Court, U.S.
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No. —

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT SILK, DOING BUSINESS AS ALBERT SILK COAL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit, entered in the above cause on April 19, 1946, affirming the decision of the District Court of the United States for the District of Kansas, First Division.

OPINIONS BELOW

The opinion of the District Court (Oral statement R. 104–108) is not reported. The opinion of the Circuit Court of Appeals (R. 110–113) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 19, 1946. (R. 113–114.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether certain persons when unloading coal from freight cars into the bins of the taxpayer, a retail coal dealer, were performing services as his employees within the meaning of Sections 811 (b) and 907 (c) of the Social Security Act and Sections 1426 (b) and 1607 (c) of the Internal Revenue Code, as amended.

2. Whether certain other persons when engaged in hauling coal for the taxpayer were performing services as his employees within the meaning of Sections 811 (b) and 907 (c) of the Social Security Act and Sections 1426 (b) and 1607 (c) of the Internal Revenue Code, as amended

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 13–17.

STATEMENT

Respondent brought this action for refund of taxes levied and collected by the petitioner under Titles VIII and IX of the Social Security Act and subchapters A and C of Chapter 9 of the

Internal Revenue Code, for the years 1936 through 1939. The tax was levied with respect to amounts paid by respondent to certain persons known as "unloaders" who unloaded the respondent's coal from freight cars into his storage bins and "truckers" who later hauled the coal to the respondent's customers. The sole issue between the parties in the court below was whether or not these persons were engaged in performing the unloading and hauling services as employees of the respondent within the meaning of the taxing provisions. (R. 16–17.)

The facts are not in dispute.[1]

1. *The unloaders.*—Respondent is a retail coal dealer in Topeka, Kansas. He has a large and extensive retail coal business. The unloaders are men who come to respondent's coal yard and unload coal from railroad cars into the bins. If when they come there is coal to unload, they are assigned a car and told in what bin they are to put the coal. They furnish their own tools—shovels and sometimes picks (R. 84, 88)—and are paid an agreed price per ton. They come and go as they please. They likewise work for others at times, without knowledge or consent of respondent. The only unloader who testified, as respondent's witness, declared that he worked two-thirds of the time in the winter season as an unloader

[1] Except where otherwise indicated the facts are taken from the findings of the District Court (R. 7–12) and the opinion of the Circuit Court of Appeals (R. 110–112).

in respondent's yard (R. 90). Respondent testified that the unloaders did what the yard foreman "told them to do", that although he did not direct them in their duties, "he supervised" (R. 58). The court below interpreted this as meaning that he merely designated the car and the bin into which they were to unload.[2] Respondent testified that the men are told "not to break the coal more than they can help it" (R. 55).

2. *The truckers.*—Respondent does not own the trucks or other vehicles used for the purpose of delivering the coal he sells. He contracts with individual owners of trucks for the delivery of coal at an agreed price per ton. They provide their own equipment and supplies. He pays them, usually once a week, out of the price received from his customers. They make C. O. D. collections for him when requested (R. 41, 86).

The truckers assemble in a designated building on respondent's premises, and, by their own arrangement, answer in rotation calls from respondent when he receives an order to deliver coal. A trucker is not required to make any delivery; he may reject the order. If he accepts it he drives his truck to the proper bin in respondent's yard, loads the truck himself, and delivers the coal to the customer's bin. He fixes

[2] There is also testimony that unloaders worked under the direction of the yard foreman with respect to miscellaneous yard work such as screening and cleaning up the yard, where they were paid by the hour. (R. 59, 89–90.)

his own hours, can come and go as he pleases, and is not supervised in his activities. Customers' complaints as to deliveries are made to respondent, who tells the trucker (R. 48, 95). Respondent sends someone to clean up, when necessary, and pays for any damage (R. 48–49, 95–96).

The truckers also haul for other persons when they so desire. But during the winter season they usually stick to respondent (R. 52). Many of the same men would show up regularly day after day for years (R. 69, 80, 84, 94). Those who testified[*] all indicated that by far the largest portion of their income—in some instances practically all of it—was derived from working for respondent (R. 78–79, 84, 96, 100).

Upon the facts just summarized the District Court held that both the truckers and the coal unloaders were not employees of the respondent but, instead, were independent contractors, and that the remuneration which he paid to them for their services did not come within the scope of the taxing provisions of the Social Security Act and corresponding sections of the Internal Revenue Code. (R. 13, 104–108). The Circuit Court of Appeals affirmed (R. 110–113).

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in failing to hold that the persons in question were em-

[*] At the urging of the court the number of witnesses was limited in order to avoid cumulative testimony (R. 91, 103).

ployees of the respondent and that he was liable for the social security taxes in question.

2. The Circuit Court of Appeals erred in failing to look to the purposes of the Social Security Act and to consider the economic facts of the relationship in holding that the persons engaged in unloading and hauling coal for the respondent were not his employees within the meaning of the Act.

3. The Circuit Court of Appeals erred in failing to consider the simple and manual nature of the work being performed by the persons unloading and hauling coal and in applying a legal concept of the traditional employer-employee relationship so restrictive in its scope as to eliminate all employment except that performed under constant and detailed direction and control by the respondent.

REASONS FOR GRANTING THE WRIT

1. Insofar as the unloaders are concerned, the decision below squarely conflicts with the decision of the Court of Appeals for the District of Columbia in *Grace* v. *Magruder*, 148 F. 2d 679, certiorari denied October 8, 1945, October Term 1945, No. 102. The *Grace* case also involved the status under the Social Security Act of laborers who unloaded coal. In that case, as in this one, the laborers worked when they liked, without supervision, worked for other persons as well as the taxpayer, provided their own tools, and were

not required to accept particular jobs.[4] The only factual difference is that in the *Grace* case the laborers unloaded from the delivery truck into the customer's storage bin, whereas here the workers unload from the railroad car into the bin in the dealer-taxpayer's yard.[5] As has been pointed out, in the present case the unloader is assigned by respondent to a particular car and bin, an item of control not present in the *Grace* case. The unloader at the customer's establishment is obviously subject to less supervision and control than the unloader in the dealer's own yard. On the facts, if there is any difference at all, the unloaders in this case are more clearly employees than in the *Grace* case.

The decision in the *Grace* case that the unloaders, therein called "hustlers", are employees of the dealer is thus plainly inconsistent with the decision below here. The Court of Appeals for the District of Columbia, following *National La-*

[4] The facts of the *Grace* case were not fully set forth in the opinion of the Court of Appeals. They may be found, however, at pages 56–62 of the Record filed with this Court in *Grace* v. *Magruder*, No. 102, October 1945 Term, certiorari denied, October 8, 1945.

[5] In the *Grace* case the trial court had found that the taxpayer (148 F. 2d, at 682):

"* * * has no agreement with the hustlers reserving the right to supervise the work of storing or directing the manner in which they store the coal, and [2] that no supervision or control is exercised either by plaintiff or the customer over the storage of coal or over the man who does the work of storing, or over the time and manner in which the work is done. * * *"

bor Relations Board v. *Hearst Publications, Inc.*, 322 U. S. 111, and the decision of the Fourth Circuit in *United States* v. *Vogue, Inc.*, 145 F. 2d 609, reasoned that the test under the Social Security Act was not the "Common law rules as to distinctions between servants and independent contractors", but the objective of Congress in enacting Social Security legislation (148 F. 2d at 680–681). In the alternative the Court of Appeals held that even under the orthodox tort liability test, the unloaders were not independent contractors.

The court below in the instant case, although stating that the "strict common law concept * * * is not the test" (R. 112), proceeds to base its decision on the absence of what it regards as sufficient "direction and control over the method and means of performing the services performed" (R. 112–113).[6] Such a standard, we think, is indistinguishable from the so-called common law test which the court purported to reject. The decision in our view thus conflicts with *Grace* v. *Magruder* both with respect to whether the so-called common law approach is to be used in cases of this type and on the applicability of that test, if it is to be used, on identical facts.

We recognize that this Court has denied certiorari on other occasions, on which its attention

[6] *Glenn* v. *Beard*, 141 F. 2d 376 (C. C. A. 6), certiorari denied, 323 U. S. 724, rehearing denied, 324 U. S. 889; *Grace* v. *Magruder*, 148 F. 2d 679 (App. D. C.), certiorari denied October 8, 1945.

has been called both to the importance of a definitive ruling as to the test to be applied in determining that persons are employees subject to the Social Security Act, and to the fact that some circuit courts of appeals were following the rule of the *Hearst* case while others were applying the so-called "common law" rule. Inasmuch as none of those cases involved identical factual situations, each could be said to turn on its particular facts. Since the *Grace* case and the decision below are indistinguishable in their facts, that obstacle to certiorari does not exist here. In view of the conflict this is clearly an appropriate decision for this Court to review.

2. It does not seem necessary here to elaborate on the obvious importance of a decision as to whether the strict control (or "common law") test or one more consistent with the purposes of the statute shall apply under the Social Security Act. Where individuals are engaged to devote their manual labor to the business of another for wages, differences in the degree of supervision

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[7] *United States* v. *Vogue, Inc.*, 145 F. 2d 609 (C. C. A. 4); *Grace* v. *Magruder*, *supra*. *Cf. Nevins, Inc.* v. *Rothensies*, 151 F. 2d 189 (C. C. A. 3) affirming *per curiam* 58 F. Supp. 460 (E. D. Pa.).

[8] *Glenn* v. *Beard*, *supra*; *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51 (C. C. A.); *Texas Co.* v. *Higgins*, 118 F. 2d 636 (C. C. A. 2); *Deecy Products Co.* v. *Welch*, 124 F. 2d 592 (C. C. A. 1); *American Oil Co.* v. *Fly*, 135 F. 2d 191 (C. C. A. 5); *Jones* v. *Goodson*, 121 F. 2d 176 (C. C. A. 10); *cf. United States* v. *Aberdeen Aerie No. 24*, 148 F. 2d 655 (C. C. A. 9).

over them should not be controlling in passing on the question of employment for purposes of a statute having as its end economic protection in old age and in periods of unemployment. A factor of much greater consequence should be a worker's economic dependence upon the employer. To hold that unskilled laborers, whose work is not supervised because it is too simple to require supervision, are independent contractors[*] and accordingly not within the Social Security Act clearly frustrates the accomplishment of the objectives of that legislation. *Cf. National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111.

The divergence in approach among the circuit courts of appeals emphasizes the desirability and importance of an authoritative disposition of the question.

3. We also urge that if the Court is of the view that the question as to the status of the unloaders should be reviewed for the reasons set out above, the status of the truckers also be considered in order that the whole case may be disposed of in accordance with what this Court decides to be the correct test. The primary difference between the truckers and the unloaders is that the former own

[*] See Restatement of the Law of Agency, Sec. 220, p. 486 (subsection 2, comment e) in which it is stated: "Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost conclusively a servant in spite of the fact that he may nominally contract to do a specified job for a specified price".

equipment of substantial value, their trucks.[10] In other respects their work of loading the trucks, driving them to the customer's establishment and unloading them is not substantially different. Although the truckers do not have to undertake particular jobs, once they accept a job their work is of the sort customarily performed by employees, and in fact many of them work steadily for respondent and derive the major portion of their income from such work (see p. 5, *infra*). If, as the *Hearst* decision holds, the word "employee" should be construed in accordance with the objectives of the statute in which it is found, persons who perform such work for another should be covered by the Social Security Act.

The employment arrangement with respect to the truckers is not a novel one. It is fairly typical of innumerable others which have been worked out by employers to meet the peculiar exigencies of their businesses. These arrangements fall

[10] In a number of cases this has been held not to preclude truck owners from being employees. *Bedford Pulp & Paper Co.* v. *Early*, decided April 6, 1944, D. C. E. D. Va. (1 P-H Social Security Tax Service, par. 36,316); *Grand Rapids Gravel Co.* v. *United States*, decided March 30, 1943, D. C. W. D. Mich. (1 P-H Social Security Tax Service, par. 36,247); *Perkins Bros., Inc.* v. *Birmingham*, decided October 19, 1944, D. C. N. D. Iowa (1 P-H Social Security Tax Service, par. 36,347); *Willard Sugar Co.* v. *Gantsch*, 59 F. Supp. 82 (N. D. Ohio); *Matter of Hiner*, decided September 2, 1941, D. C. S. D. Ind., (1 P-H Social Security Tax Service, par. 36,133); *Industrial Com.* v. *Bonfils*, 78 Colo. 306; *Fox Park Timber Co.* v. *Baker*, 53 Wyo. 467.

within a twilight zone between those relationships which are unequivocally employment and those which are clearly entrepreneurial. They partake, in part, of the nature of both, but are truly representative of neither. A decision by this Court as to the truckers will greatly aid in clarifying the application of the Act to the cases of this group.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

JULY 1946.

APPENDIX

Social Security Act, c. 531, 49 Stat. 620:

TITLE VIII—*Taxes With Respect To Employment*

* * * * *

SECTION 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date: * * *

(42 U. S. C. 1940 ed., Sec. 1001.)

SEC. 802. (a) The tax imposed by section 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax, and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

* * * * *

(42 U. S. C. 1940 ed., Sec. 1002.)

SEC. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date: * * *

(42 U. S. C. 1940 ed., Sec. 1004.)

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment; including the cash value of all remuneration paid in any medium other than cash; * * *

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer [with exceptions not herein relevant] * * *.

(42 U. S. C. 1940 ed., Sec. 1011.)

TITLE IX—*Tax On Employers of Eight Or More*

* * * * * * *

SECTION 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year: * * *

(42 U. S. C. 1940 ed., Sec. 1101.)

SEC. 907. When used in this title—

* * * * * * *

(b) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer [with exceptions not herein relevant] * * * (42 U. S. C. 1940 ed., Sec. 1107.)

Sections 1400, 1401 (a) (b), 1410, 1426 (a) (b), 1600 and 1607 (b) (c) of the Internal Revenue

Code, in so far as pertinent here, are substantially the same as Sections 801, 802 (a), 804, 811 (a) (b), 901, and 907 (b) (c) set out above.

Treasury Regulations 90, promulgated under Title IX of the Social Security Act:

> ART. 205. *Employed individuals.*—An individual is in the employ of another within the meaning of the Act if he performs services in an employment as defined in section 907 (c). However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the Act.
>
> The words "employ", "employer", and "employee", as used in this article, are to be taken in their ordinary meaning. An employer, however, may be an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group, or entity. An employer may be a person acting in a fiduciary capacity or on behalf of another, such as a guardian, committee, trustee, executor or administrator, trustee in bankruptcy, receiver, assignee for the benefit of creditors, or conservator.
>
> Whether the relationship of employer and employee exists, will in doubtful cases be determined upon an examination of the particular facts of each case.
>
> Generally the relationship exists when the person for whom services are performed has the right to control and direct the in-

dividual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists,

veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

* * * * *

ARTICLE 3, Treasury Regulations 91, promulgated under Title VIII of the Social Security Act, in so far as pertinent here, is substantially the same as Article 205 of Treasury Regulations 90 set out above.

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